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In the Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF KANSAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 48, restricts interstate airline service to and from Love Field in Dallas, Texas. The question presented is whether Section 29 violates the Port Preference Clause (Art. I, § 9, Cl. 6), petitioners' constitutional right to travel interstate, or the First Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Alabama Great Southern R.R. v. *United States*, 340 U.S. 216 (1951)	5
Attorney General v. *Soto-Lopez*, 467 U.S. 898 (1986)	7
Board of Trustees v. *Fox*, 492 U.S. 469 (1989)	9, 10, 11
Bray v. *Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993)	6
Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980)	8, 9, 10
City of Cincinnati v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993)	9
City of Houston v. *FAA*, 679 F.2d 1184 (5th Cir. 1982)	7
Cramer v. *Skinner*, 931 F.2d 1020 (5th Cir.), cert. denied, 112 S. Ct. 298 (1991)	2, 3, 4, 5, 9
Edenfield v. *Fane*, 113 S. Ct. 1792 (1993)	9
Ibanez v. *Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084 (1994)	9
Louisiana Public Serv. Comm'n v. *Texas & New Orleans*, 284 U.S. 125 (1931)	5, 6
Northwest Airlines, Inc. v. *Minnesota*, 322 U.S. 292 (1944)	9
Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978)	11
Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856)	5, 6

Cases—Continued: Page

Posadas de Puerto Rico Assocs. v. *Tourism Co.*, 478 U.S. 328 (1986) 8, 10
R.M.J., In re, 455 U.S. 191 (1982) 11
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 7
Turner Broadcasting Sys., Inc. v. *FCC*, 114 S. Ct. 2445 (1994) 10
United States v. *Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993) 9, 10
Zobel v. *Williams*, 457 U.S. 55 (1982) 6

Constitution and statutes:

U.S. Const.:
Art. I, § 9, Cl. 6 (Port Preference Clause) 4, 5, 6
Amend. I 4, 8
International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35:
§ 29, 94 Stat. 48 2
§ 29(a), 94 Stat. 48 2
§ 29(b), 94 Stat. 48 ..... 2, 3

Miscellaneous:

H.R. Conf. Rep. No. 716, 96th Cong., 1st Sess. (1979) 2
Love Field Amendment Proceeding, DOT Order No. 85-12-81 (Dec. 31, 1985) petition for review denied *sub nom. Continential Air Lines, Inc.* v. *Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 16 F.3d 436. The opinion of the district court (Pet. App. 17a-38a) is reported at 797 F. Supp. 1042.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1994. On April 15, 1994, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 18, 1994. The petition for a writ of certiorari was filed on June 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 48, is known as the "Love Field" or "Wright" Amendment. It was enacted to provide "a fair and equitable settlement for a dispute that ha[d] raged in the Dallas/Fort Worth [Texas] area for many years." H.R. Conf. Rep. No. 716, 96th Cong., 1st Sess. 24 (1979). The dispute concerned whether Dallas or Forth Worth should have the principal airport for the metropolitan area that had grown up around the two cities. To resolve that dispute, the two cities agreed that all flights at Love Field and other airports in the area would be moved to a new airport, Dallas-Fort Worth International Airport (DFW). Pet. App. 3a; see also *Cramer* v. *Skinner*, 931 F.2d 1020, 1023 (5th Cir.), cert. denied, 112 S. Ct. 298 (1991). The cities' agreement was threatened, however, by the successful refusal of Southwest Airlines to terminate its operations at Love Field. The Love Field Amendment was designed to ensure the economic viability of DFW by limiting interstate operations at Love Field. Pet. App. 3a-4a.

The Amendment generally prohibits airlines from offering single ticket interstate service between Love Field and any place in a State other than Texas and its four bordering States (Louisiana, Arkansas, Oklahoma, and New Mexico), which are known collectively as the Love Field Service Area. § 29, 94 Stat. 48.[1] Passengers

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[1] The Amendment permits unrestricted interstate travel to and from Love Field to be provided by a limited number of charter air flights and by commuter aircraft with a passenger capacity of fewer than 57 passengers. In addition, it permits persons who provided service from Love Field on November 1, 1979, to con-

may travel between Love Field and points outside the Love Field Service Area, however, if they first fly from Love Field to a State in the Service Area, and then take a second flight to their destination. To do so, such travellers must buy separate tickets for each leg of their journey, and they cannot check their baggage through for the entire trip. Pet. App. 4a; *Love Field Amendment Proceeding*, DOT Order No. 85-12-81 (Dec. 31, 1985), petition for review denied *sub nom. Continental Air Lines, Inc.* v. *Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988). Passengers may also obtain unrestricted interstate airline service at DFW, which is located 18 miles from Dallas and only 12 miles from Love Field. *Cramer*, 931 F.2d at 1023.

As construed by the Department of Transportation, the Love Field Amendment prohibits airlines and their agents from advertising or volunteering information about scheduled interstate services offered with large aircraft between Love Field and points outside the Love Field Service Area. § 29(b), 94 Stat. 48; *Love Field Amendment Proceeding*, DOT Order No. 85-12-81 (Dec. 31, 1985). Airlines and their agents may provide that information, however, if a passenger requests it.

2. Petitioners are the State of Kansas, the Wichita Airport Authority, a Kansas travel agency, and several individuals claiming that the Love Field Amendment interferes with their travel plans. Pet. App. 5a. They filed this action in the United States District Court for the District of Columbia seeking declaratory and equitable relief against those responsible for enforcing

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tinue to provide service to the same points as were served on that date. § 29(a) and (b), 94 Stat. 48.

the Love Field Amendment. Pet. App. 6 n.6.[2] They claimed that the Amendment violates the Port Preference Clause (Art. I, § 9, Cl. 6), their right to travel interstate, and the First Amendment. See Pet. 6. On cross-motions for summary judgment, the district court rejected those claims. Pet. App. 17a-38a.

3. The court of appeals affirmed. Pet. App. 6a-15a.[3] It rejected petitioners' constitutional claims, and it noted that those claims had also been rejected in "[a] virtually identical lawsuit" brought in the Fifth Circuit by the same counsel who represents petitioners. *Id.* at 5a, citing *Cramer* v. *Skinner*, *supra*.

ARGUMENT

The District of Columbia Circuit correctly rejected petitioners' constitutional challenges to the Love Field Amendment. Moreover, its decision is consistent with the Fifth Circuit's decision in *Cramer* v. *Skinner*, *supra*, which rejected identical challenges. This Court denied further review in *Cramer* v. *Skinner*, 112 S. Ct. 298 (1991), and there is no reason for a different disposition here.

1. Contrary to petitioners' contention (Pet. 9-17), the court of appeals correctly concluded (Pet. App. 6a-9a) that the Love Field Amendment does not violate the Port

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[2] The complaint named the United States, the Department of Transportation, the Secretary of Transportation, the Department's Office of Aviation Analysis, and the Director of the Office of Aviation Analysis as defendants. Respondents American Airlines and Dallas-Fort Worth International Airport Board intervened as defendants in the district court.

[3] The court of appeals first held that "at least some of the individual [petitioners] have standing to raise all [three] of the [constitutional] challenges." Pet. App. 5a.

Preference Clause. That Clause states: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." U.S. Const. Art. I, § 9, Cl. 6.

As the court of appeals held, the Love Field Amendment does not violate the first part of the Port Preference Clause. As the court explained, the "obvious purpose and the primary impact" of the Amendment is not to favor a port in one State over a port in another State. Pet. App. 9a; accord *Cramer*, 931 F.2d at 1032 n.14. Instead, the primary purpose and effect of the Amendment is to favor one airport in Texas (DFW) over another airport in Texas (Love Field). See Pet. App. 8a. As the court of appeals stated, "[s]uch a preference is of no concern to the Port Preference Clause[,] which is designed to protect states, not individual ports." *Ibid.*

Petitioners contend that the Love Field Amendment impermissibly favors airports in the Love Field Service Area over airports outside the Service Area. The court of appeals recognized that airports in the Service Area might have a "rather insignificant" preference over airports outside the Service Area with respect to "travelers bound to [or from] Dallas," because airports in the Service Area, unlike those outside the Service Area, may provide direct service to Love Field, which is somewhat closer to Dallas than DFW is. Pet. App. 8a. But the court correctly concluded that such "incidental advantages" do not violate the Port Preference Clause. Pet. App. 9a (quoting *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1856), and citing *Alabama Great Southern R.R.* v. *United States*, 340 U.S. 216, 229 (1951), and *Louisiana Public*

Serv. Comm'n v. *Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931)); accord *Cramer*, 931 F.2d at 1032.

The court of appeals was also correct in holding that the Love Field Amendment does not violate the second part of the Port Preference Clause, which provides that "Vessels bound to, or from, one State" shall not "be obliged to enter, clear, or pay Duties in another [State]." U.S. Const. Art. I, § 9, Cl. 6. Airplanes traveling to or from Texas are not required by the Amendment to pass through any particular port in the Service Area, as long as they are traveling to or from some point in Texas other than Love Field. Therefore, as the court of appeals determined, the second part of the Port Preference Clause "do[es] not literally cover" the Love Field Amendment. Pet. App. 8a; see also *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) at 435 (Port Preference Clause does not prevent the government from designating ports of entry, so long as there is no "discrimination between States").[4]

2. Petitioners also contend that the Love Field Amendment violates the right to travel interstate. Pet. 23-27. That right protects interstate travelers from "'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers." *Bray* v. *Alexandria Women's Health Clinic*, 113 S. Ct. 753, 763 (1993) (quoting *Zobel* v. *Williams*, 457 U.S. 55, 60

[4] Moreover, as the government argued in the court of appeals, the Love Field Amendment does not implicate the second part of the Port Preference Clause because the Amendment applies only to the transportation of passengers (and not goods), whereas the Clause applies to vessels with goods that are required to "enter" through and "clear" customs. The court of appeals observed that that argument is "probably correct," but found it unnecessary to resolve. Pet. App. 7a.

n.6 (1982)). Petitioners appear to argue (Pet. 25-26) that the Love Field Amendment implicates both protections because (1) it burdens interstate travel to and from Texas; and (2) it treats interstate passengers bound to or from Love Field differently from interstate passengers bound to or from other points in Texas. Neither argument is substantial.

The court of appeals correctly held that the Love Field Amendment does not have either the purpose or the effect of burdening interstate travel to and from Texas. Pet. App. 9a-12a. Indeed, as the court observed, "the whole purpose of the Amendment was to encourage interstate air travel to and from the Dallas-Fort Worth area, by channelling it through the newly built DFW airport." *Id.* at 11a. The court recognized that it is possible, "at least theoretically, [that] there exist some putative Dallas passengers who forego interstate air travel to or from points outside the Service Area because the [Love Field] Amendment makes it burdensome to fly into Love Field and the alternative, DFW, is a longer drive." *Id.* at 12a. The court properly concluded, however, that any such theoretical impact is too "negligible" and "trivial" to amount to an unconstitutional burden on interstate travel. *Id.* at 11a, 12a; see *City of Houston* v. *FAA*, 679 F.2d 1184, 1198 (5th Cir. 1982) (rejecting right-to-travel argument that "reduce[d] to the feeble claim that passengers have a constitutional right to the most convenient form of travel").

Moreover, the Love Field Amendment is readily distinguishable from statutes that this Court has held discriminate in a manner that violates the right to interstate travel. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), involved a one-year waiting period for new state residents seeking welfare assistance; *Attorney General*

v. *Soto-Lopez*, 476 U.S. 898 (1986), involved an employment preference that was available only to job applicants who had been New York residents when they joined the military. In contrast, the Love Field Amendment does not distinguish between new residents and longtime residents, or between residents and non-residents. Instead, it distinguishes between two classes of interstate travelers, and does so only to the extent of influencing their choice between two nearby airports in the same State.

3. As noted above, the Department of Transportation has construed the Love Field Amendment to prohibit the advertising of air service between Love Field and points outside the Love Field Service Area. See p. 3, *supra*. Petitioners argue (Pet. 17-23) that this advertising restriction violates the First Amendment. The court of appeals correctly rejected that argument. Pet. App. 12a-15a.

As an initial matter, the court of appeals properly reviewed the Love Field advertising restriction under the four-part test articulated in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). See Pet. App. 13a. Petitioners, however, renew (Pet. 17-19) their argument that the restriction is subject to a more stringent standard of review because it concerns the right to travel interstate. The court of appeals correctly decided that it "need not depart from *Central Hudson* since the advertising restrictions do not impinge on [the right to travel interstate]." Pet. App. 13a n.6. Moreover, this Court has made clear that heightened scrutiny of a commercial speech restriction is appropriate only when the underlying activity "could not have been prohibited by the State." *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 345

(1986). Because Congress could have prohibited all interstate service to Love Field (see Pet. App. 15a) or even closed the field altogether, heightened scrutiny is not appropriate here.

The court of appeals also correctly held that the Love Field advertising restriction satisfies the *Central Hudson* test. Under that test, a restriction on commercial speech must directly advance a substantial governmental interest in a manner that is narrowly tailored to serve that interest. See *Central Hudson*, 447 U.S. at 566; see also *Ibanez* v. *Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2088-2089 (1994); *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993); *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1798 (1993); *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993); *Board of Trustees* v. *Fox*, 492 U.S. 469, 475 (1989).

First, the Love Field advertising restriction furthers a substantial governmental interest. As noted above (p. 2, *supra*), the Love Field Amendment as a whole was enacted to resolve the longstanding dispute over the location of the Dallas-Fort Worth area's principal airport, a dispute "that had long hindered efforts to improve airline service for * * * [that] area." *Cramer*, 931 F.2d at 1034. The Amendment ensures the economic viability of DFW—the airport that the two cities agreed would serve as the principal airport for the area (see Pet. App. 3a)—by channeling interstate flights to DFW. As the court of appeals recognized, it is "impossible to question" the substantiality of the federal government's interest in enhancing interstate travel to a large metropolitan area, especially in a manner that facilitates an agreement between the affected munici-palities. *Id.* at

15a (citing *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)).

Moreover, the Love Field advertising restriction furthers the governmental interest in a direct and material way. This Court has recognized as a matter of common sense that a restriction on the advertising of a service limits demand for the service. *Edge Broadcasting*, 113 S. Ct. at 2707; *Posadas*, 478 U.S. at 342; *Central Hudson*, 447 U.S. at 569. That recognition fully applies to the Love Field restriction, which limits demand for a service—*i.e.*, airline service between Love Field and points outside the Service Area—by limiting advertising of the service.[5]

Finally, the Love Field advertising restriction is narrowly tailored to achieve its purpose. See *Fox*, 492 U.S. at 480. It does not prohibit the advertising of *all* interstate air service to and from Love Field, but only of service between Love Field and points outside the Service Area. Moreover, it does not prevent passengers

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[5] Petitioners cite a Department of Transportation study as evidence that the governmental interest underlying the Love Field advertising restriction "has admittedly terminated," and that the restriction no longer materially advances that interest. Pet. 21-22. Petitioners' reliance on the study is misplaced. The Love Field Amendment embodies a judgment by Congress regarding the existence of a governmental interest. It is for Congress, not the courts, to determine whether the governmental interest underlying a statute has terminated. Congress also is in the best position to determine whether changed circumstances warrant amendment or repeal of such legislation, see *Turner Broadcasting Sys., Inc.* v. *FCC*, 114 S. Ct. 2445, 2471 (1994), after taking into account materials furnished by the Executive Branch and others. As petitioners acknowledge, Congress has repeatedly declined to enact proposed legislation that would repeal or modify the Love Field Amendment. Pet. 21.

from obtaining information about air service between Love Field and points outside the Service Area. The airlines may provide such information when passengers ask for it. Pet. App. 14a. Thus, the advertising restriction is "in proportion to the interest served." *Fox*, 492 U.S. at 480 (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)); cf. *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 458 (1978) (attorney disciplinary rule before the Court "does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice").[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioners contend (Pet. 23) that the court of appeals erred by failing to consider unspecified "alternative means" of advancing the governmental interest underlying the Love Field advertising restriction. This Court has squarely held, however, that the *Central Hudson* test does not require a "least restrictive means" analysis. *Fox*, 492 U.S. at 473-481.